

Environment

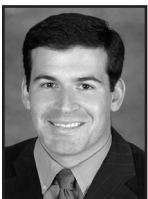
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# Alert

## Bush Administration Leaves Its Mark on the Endangered Species Act With Significant Amendments to the Consultation Regulations

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On December 16, 2008, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (Services) published a final rule (Section 7 Rule) in the Federal Register that makes significant changes to certain provisions of the consultation requirements under Section 7 of the Federal Endangered Species Act (ESA).<sup>1</sup> In one of the final actions of the Bush Administration’s environmental agenda, these actions set the stage for the Obama Administration to wrestle with the scope of the ESA, and in particular, the interplay of climate change and its impact on endangered species.



### Overview

In the Department of Interior press release announcing the final Section 7 Rule,<sup>2</sup> Interior Secretary Dirk Kempthorne described the rule as a “narrow update of existing regulation,” and reiterated that the purpose was to explain that “the Endangered Species Act is not the right tool to set climate change policy” and to clarify when consultations are required “so the government can focus on protecting endangered species as it works to rebuild the American economy.”<sup>3</sup> Despite the recent report released by the Department of Interior Climate Change Task Force, which clearly enumerates the potentially enormous implications of global climate change for endangered species,<sup>4</sup> the rule reflects the Services’ “conclusion that section 7(a)(2) is not

an appropriate or effective mechanism to assess individual Federal actions as they relate to global issues such as global climate change and warming.”<sup>5</sup>

Overall, the rule updates the regulation implementing Section 7 of the ESA, which requires federal agencies to consult with the Services before they undertake or approve an action that may affect a listed species. Through defining when consultation is not required and removing consideration of greenhouse gas (GHG) emissions from the consultation process, the Section 7 Rule effectively reduces the regulatory burden of the consultation process.

Not surprisingly, the reaction to the issuance of this rule was immediate and divergent. While the regulatory community hailed the reduction of regulatory burdens as a welcome “streamlining” and “much-needed balance,”<sup>6</sup> several environmental groups did not let a day pass before filing suit.<sup>7</sup> Now the Obama Administration will have to make a determination of how to address these changes, given that they were solidified by final rulemaking and therefore cannot simply be ignored without going through a formal process.

### Summary and Analysis of Final Rule

The Section 7 Rule includes the following components: (1) the addition of language that delineates when Section 7 consultation is not required, including (2) an in-depth discussion of the exclusion for effects related to “global processes; (3) clarification of the causation standard used in determining the “effects” of agency actions; (4) inclusion of time frames in the informal consultation process; and (5)

clarification that the federal agencies do not have to create a new document to comply with the requirement for doing a Biological Assessment to initiate Section 7 Consultations.

### 1. Exemptions to consultation

In the drive to streamline consultations, the final Section 7 Rule revises 50 C.F.R. Section 402.03 (Applicability) to explicitly state that consultation is not required where the direct and indirect actions of the agency are not anticipated to result in a “take” of a species<sup>8</sup> and when the action fulfills one of the following four criteria: (1) the action will have no effect on listed species or critical habitat; (2) the effects of such action are manifested through “global processes” and (a) cannot be reliably predicted or measured at the scale of a listed species current range or (b) would result in at most an extremely small, insignificant, or remote impact on a species; (3) the effects are not capable of being measured or detected in a manner that permits meaningful evaluation; or (4) the effects are wholly beneficial.<sup>9</sup> The rule clarifies that the action agency can limit its analysis to only effects of the action that fall outside the exclusions listed above.<sup>10</sup>

The rule provides examples of how the exceptions to the consultation requirements may be interpreted. For example, the rule lists such activities as “construction, maintenance or repair of “small-scale bulkheads, docks, piers, and boat ramps; small-scale shoreline or streambank stabilization projects; routine bridge repair and maintenance, and construction, maintenance or repair or replacement of culverts, tide gates and aids to navigation” as actions that would routinely not require consultation.<sup>11</sup> As justification for the exclusions, the agencies discuss the need to reduce the number of unnecessary consultations, given that “[m]ost major action agencies already have well-qualified staff that support their ESA compliance. And, agencies regularly make their own consultation determinations on a number of issues under the 1986 regulations.”<sup>12</sup>

### 2. Exemption for effects that are manifested through “global processes”

The most significant revision in the final Section 7 Rule is to the portion of section 402.03 describing the exemption to the consultation requirement for effects that are manifested through “global processes.” The draft rule had provided that Federal agencies are not required to consult when the direct and indirect effects of an action are not anticipated to result in take and such an action is an “insignificant contributor” to any effects on a listed species or critical habitat. The final rule replaced this “insignificant contributor” standard with the following language in an attempt to establish a “very narrow applicability exception”: consultation is not triggered where the “effects of [the] action are manifested through global processes and: (i) Cannot be reliably predicted or

measured at the scale of a listed species’ current range, or (ii) Would result at most in an extremely small, insignificant impact on a listed species or critical habitat, or (iii) Are such that the potential risk of harm to a listed species or critical habitat is remote; or (3) The effects of such action on a listed species or critical habitat: (i) Are not capable of being measured or detected in a manner that permits meaningful evaluation; or (ii) Are wholly beneficial.”<sup>13</sup>

In the final Section 7 Rule, the Services clarify the phrase “manifested through global processes” as covering “those effects that are the result of a specific source but become well mixed and diffused at the global scale such that they lose their individual identity.”<sup>14</sup> These combined effects become a “potential contributor to a separate phenomenon with possible global impacts,” but the contribution of any particular source to the global process that then affects a global environment is typically “very, very small.”<sup>15</sup> However, the Services also explain that the term “manifested through global processes” does not refer to effects “that can be evaluated for the immediate effects on the surrounding area caused by their primary physical and chemical characteristics ... [because] they would be traced and measured to the extent possible.”<sup>16</sup> Nor does the term “preclude the appropriate consideration of climate change, generally, for purposes of establishing the environmental baseline and the status of the species in the action area ... [for example, information on different precipitation patterns than experienced in the past].”<sup>17</sup>

In explaining the intent behind this revision and behind the rule more generally, the Services stated unequivocally that they “believe that section 7(a)(2) simply was not intended to deal with global processes at individual project level consultations.”<sup>18</sup> The Services captured the practical problem of using the ESA to regulate climate change by observing that “to attempt to regulate effects at a global scale would have the untenable consequence of transforming the ‘action area’ for consultation into the globe itself.”<sup>19</sup> Directly addressing the intent of the ESA, the Services stated further that they do not believe “that Congress designed or intended the ESA to be utilized as a tool to regulate global processes.”<sup>20</sup> The Services concluded this discussion with the following statement, which goes to one of the essential policy debates in climate change regulation and clearly indicates on which side of the debate the outgoing Bush Administration falls: it is not “appropriate to hold an agency responsible for global processes.”<sup>21</sup>

The revised language in section 402.03 makes the Services’ policy position on the appropriateness of regulating climate change through the ESA even clearer, but the language itself appears to present ripe opportunities for confusion and litigation. Phrases like “global processes,” “extremely” or “very, very” small, and “well mixed” are vague and ill-defined, and

have not been used in past ESA practice. As noted above, environmental groups have already filed lawsuits challenging the final Section 7 Rule, and it is likely that section 402.03 will be at the center of pending litigation.

### 3. Scope of effects that must be analyzed in the Section 7 consultation

In addition to adding provisions limiting when consultations are required, the final Section 7 Rule limits the scope of analysis by adding and clarifying the definitions used by the agencies in considering the “effects of the action,” including cumulative effects and indirect effects.<sup>22</sup> The rule provides definitions for the terms “cumulative effects” and “indirect effects” – which has an obvious impact on the scope of analysis that has to be prepared. The rule first adds a definition of “direct effects” in order to clarify the distinction between “direct” and “indirect” effects.<sup>23</sup> “Direct effects” are “the immediate effects of the action and are not dependent on the occurrence of any additional intervening actions for the impacts to species or critical habitat to occur.”<sup>24</sup> In turn, the rule defines “indirect effects” as those effects “for which the proposed action is an essential cause, and that are later in time, but still are reasonably certain to occur.”<sup>25</sup> This definition suggests that there must be a close causal connection between the action under consultation and the effect that is being evaluated in that “[i]f an effect will occur whether or not the action takes place, the action is not an essential cause of the indirect effect.”<sup>26</sup> Finally, the term “cumulative effects” is defined to include effects “reasonably certain to occur.”<sup>27</sup> “Reasonably certain to occur” is further defined to mean that there is “clear and substantial information” that an effect will happen.<sup>28</sup>

In enacting these definitions, the agencies indicated that they were addressing “confusion” concerning how effects are identified and analyzed.<sup>29</sup> The preamble notes how the agencies struggled with determining where along the spectrum of effects the lines for “indirect” and “cumulative” effects should be drawn as well as issues of causation.<sup>30</sup> The rule also provides that cumulative effects under the ESA has a narrower meaning than “cumulative impacts” under the National Environmental Policy Act in that it does not include future federal activities and rather than being “reasonably foreseeable,” future actions must be “reasonably certain to occur.”<sup>31</sup>

As noted in our commentary related to the draft rule, in the drive to exclude GHG analysis from the Section 7 consultation, the tighter definitions of direct and indirect effect in the final Section 7 Rule may have the unintended effect of limiting access to the Section 7 consultation for those developers who have a more limited federal “hook.” Those developers will have an increased regulatory burden and will require additional staff to prepare habitat conservation

plans for those projects that may no longer qualify for a Section 7 consultation; the rule may increase enforcement requirements for those projects that may not mitigate at all.<sup>32</sup>

### 4. Changes to the informal consultation process

Also as part of the streamlining effort, the final Section 7 Rule amends the informal consultation process to add time deadlines to limit the duration of the informal consultation. The revised 50 C.F.R. § 402.13(b) includes a requirement that the Services provide a written statement of concurrence with the action agency’s determination of effects within 60 days of the request.<sup>33</sup> If such a written statement is not received, the action agency may terminate consultation and the consultation requirements are considered satisfied.<sup>34</sup> The Services may request one 60-day extension within the first 60-day period<sup>35</sup> or it may be extended at the joint agreement of the agencies and the applicant.<sup>36</sup>

### 5. Documentation for biological assessments

Finally, in order to avoid unnecessary duplication of work, the final Section 7 Rule revises the current regulatory definition of a “biological assessment” to clarify that action agencies do not necessarily have to create a stand alone document to comply with the requirement of preparing a biological assessment under 50 C.F.R. § 402.12.<sup>37</sup> The term “biological assessment” is defined to include information prepared for the sole purpose of consultation as well as “a document or documents prepared for other purposes (e.g., an environmental assessment or environmental impact statement) containing the information required to initiate consultation.”<sup>38</sup> In response to comments, the Services noted that it is the action agency’s responsibility to describe with specificity where the relevant analysis for initiation of consultation can be found in the alternative document.<sup>39</sup>

## Conclusion

The reaction to the process for finalizing the Section 7 Rule is typical of the clash between the regulated community and environmental interest groups. Those that have been burdened by the paralysis of the regulatory review process see the changes in the scope of review, avoidance of duplication, and the deadlines of the consultation process as providing unquestionable benefit – making the process more efficient does not necessarily equate with loss of protection for species.

On the other side of the spectrum, environmental interest groups accused the Bush Administration of “cutting huge holes” in the ESA and ignoring more than 250,000 comments against the proposed rule.<sup>40</sup> In particular, these groups have argued that the rule unduly limits informal and formal consultations. Letting the federal action agency determine

that there would be no effects, they argue, would be like giving the “fox the key to the hen house.” Environmental groups also express concern that the rule includes new justifications for avoiding or minimizing consultation based on lack of causation arguments and arbitrary deadlines, allowing projects to escape ESA scrutiny.<sup>41</sup> These groups filed suit the same day that the rule was released.<sup>42</sup>

Regardless of subjective opinions on the efficacy of the rule, it clearly excludes GHG from consultations under the ESA, thereby arguably creating tension with the listing activities of the Services as well as the conclusions of the Department of Interior Task Force on Climate Change. At minimum, the position espoused in the Section 7 Rule effectively sets the table for the Obama Administration that will have to address this rule as it puts its own stamp on the GHG issue.

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<sup>1</sup> Vol. 73 Fed. Reg. 76272 (Dec. 16, 2008)

<sup>2</sup> Interior Publishes Final Narrow Changes to Regulations, Clarifies Role of Global Processes in Consultation, Dec. 11, 2008, available at <[http://www.doi.gov/news/08\\_News\\_Releases/121108a.html](http://www.doi.gov/news/08_News_Releases/121108a.html)>. Hereinafter “December 11, 2008 Section 7 Press Release.”

<sup>3</sup> *Id.*

<sup>4</sup> Department of the Interior Task Force on Climate Change, “Report of the Subcommittee on Law and Policy: An Analysis of Climate Change Impacts and Options Relevant to Legal and Policy Issues at the Department of the Interior,” Dec. 3, 2008, [http://www.usgs.gov/global\\_change/docs/law\\_policy.pdf](http://www.usgs.gov/global_change/docs/law_policy.pdf).

<sup>5</sup> 73 Fed. Reg. 76272, 76283.

<sup>6</sup> National Association of Home Builders, Statement By NAHB Chairman Sandy Dunn On Revised Regulations To The Endangered Species Act, December 11, 2008, available at <[http://www.nahb.org/news\\_details.aspx?newsID=8333](http://www.nahb.org/news_details.aspx?newsID=8333)>

<sup>7</sup> Defenders of Wildlife, *Bush Administration Takes Parting Shot at Endangered Wildlife*, December 11, 2008, available at <[http://defenders.org/newsroom/press\\_releases\\_folder/2008/12\\_11\\_2008\\_bush\\_administration\\_takes\\_parting\\_shot\\_at\\_endangered\\_wildlife.php](http://defenders.org/newsroom/press_releases_folder/2008/12_11_2008_bush_administration_takes_parting_shot_at_endangered_wildlife.php)>.

<sup>8</sup> “The term ‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” ESA Section 3(18).

<sup>9</sup> 73 Fed. Reg. 76272, 76287 (codified at 50 C.F.R. § 402.03(b)(1)-(3)). See also December 11, 2008 Section 7 Press Release (listing four criteria).

<sup>10</sup> 73 Fed. Reg. 76272, 76287 (codified at 50 C.F.R. § 402.03(c)).

<sup>11</sup> 73 Fed. Reg. 76272, 76281.

<sup>12</sup> *Id.*

<sup>13</sup> 73 Fed. Reg. 76272, 76287 (codified at 50 C.F.R. § 402.03(b)(2)).

<sup>14</sup> 73 Fed. Reg. 76272, 76282.

<sup>15</sup> *Id.*

<sup>16</sup> 73 Fed. Reg. 76272, 76282-83.

<sup>17</sup> 73 Fed. Reg. 76283.

<sup>18</sup> 73 Fed. Reg. 76272, 76280.

<sup>19</sup> 73 Fed. Reg. 76272, 76283.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> 50 C.F.R. Pt. 402.

<sup>23</sup> 73 Fed. Reg. 76272, 76286-87 (codified at 50 C.F.R. § 402.02 definitions).

<sup>24</sup> *Id.* at 76287.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> 73 Fed. Reg. 76272, 76286 (codified at 50 C.F.R. § 402.02 definitions).

<sup>28</sup> 73 Fed. Reg. 76272, 76287 (codified at 50 C.F.R. § 402.02 definitions).

<sup>29</sup> 73 Fed. Reg. 76272, 76276.

<sup>30</sup> See 73 Fed. Reg. 76272, 76276-77.

<sup>31</sup> 73 Fed. Reg. 76272, 76286.

<sup>32</sup> Holland & Knight Environment Alert, “Proposed Rule Amending the Endangered Species Act Section 7 Consultation Regulations Published in the Federal Register,” available at <http://www.hklaw.com/id24660/publicationid2437/returnid31/contentid52282/> (Aug. 15, 2008).

<sup>33</sup> 73 Fed. Reg. 76272, 76287(codified at 50 C.F.R. § 402.13(b)).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> 73 Fed. Reg. 76272, 76287(codified at 50 C.F.R. § 402.13(c)).

<sup>37</sup> 73 Fed. Reg. 76272, 76286 (codified at 50 C.F.R. § 402.02 definitions).

<sup>38</sup> *Id.*

<sup>39</sup> 73 Fed. Reg. 76272, 76275.

<sup>40</sup> Defenders of Wildlife Press Release, [http://defenders.org/newsroom/press\\_releases\\_folder/2008/12\\_11\\_2008\\_bush\\_administration\\_takes\\_parting\\_shot\\_at\\_endangered\\_wildlife.php](http://defenders.org/newsroom/press_releases_folder/2008/12_11_2008_bush_administration_takes_parting_shot_at_endangered_wildlife.php).

<sup>41</sup> Sierra Club: [http://action.sierraclub.org/site/MessageViewer?em\\_id=66524.0](http://action.sierraclub.org/site/MessageViewer?em_id=66524.0); See also, National Wildlife Federation: <http://www.nwf.org/news/story.cfm?pageId=B37BC419-15C5-5FE8-B007DAC35C60F339>; Center for Biological Diversity: [http://www.biologicaldiversity.org/news/press\\_releases/2008/esa-regulations-08-11-2008.html](http://www.biologicaldiversity.org/news/press_releases/2008/esa-regulations-08-11-2008.html); Environmental Defense Fund: <http://www.edf.org/pressrelease.cfm?contentID=8214>; Earthjustice: <http://www.earthjustice.org/news/press/2008/bush-administration-moves-to-weaken-species-protection-law.html>.

<sup>42</sup> Center For Biological Diversity et. al v. Kempthorne, CV 08-5546, (N.D. Cal.).

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